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No. 77-1807

In the Supreme Court of the United States

OCTOBER TERM, 1978

GEORGE BURGIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The memorandum of the court of appeals (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1978. The petition for a writ of certiorari was filed on June 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in permitting the prosecutor to cross-examine petitioner concerning the amount of his attorneys' fees.

2. Whether the prosecutor's comments during summation constituted reversible error.

3. Whether the instruction to the jury on petitioner's interest in the outcome of the case was proper.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of the New York, petitioner was convicted of conspiring to distribute a variety of controlled substances, in violation of 21 U.S.C. 846. He was sentenced to five years' imprisonment, to be followed by a ten-year term of special parole. The court of appeals affirmed without opinion (Pet. App. A).

1. The evidence at trial showed that between 1971 and 1975 petitioner and James Gerardi[1] were partners in a drug distribution scheme involving the transportation of narcotics from California to New York (Tr. 69-70). Their business included distributing marijuana, amphetamines, secobarbital, phencyclidine, and cocaine (Tr. 90-102). Petitioner moved to California to run the west coast operation, which involved locating sources of marijuana and couriers to transport the drugs to New York, while Gerardi directed the distribution of the drugs on the east coast (Tr. 84-88).

2. At trial petitioner testified in his own defense. The thrust of his testimony was that although many of his friends, including Gerardi, were dealing in narcotics, he was not (Tr. 362-363, 428-429). He said that he and Gerardi had a furniture business in New York and that they later invested in a jewelry store in California (Tr. 358, 364-368).

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[1]Prior to trial Gerardi had pleaded guilty to a conspiracy charge essentially the same as that upon which petitioner was tried.

In his direct examination, petitioner testified that he had limited funds during the period referred to in the indictment. He said that he went to California with a small amount of money (Tr. 345), that his money ran out (Tr. 347), that he had to borrow money from his father (Tr. 348, 368), and that the woman with whom he lived collected social security payments (Tr. 357, 362). During cross-examination, however, the prosecutor elicited that petitioner lived in a house in a wealthy suburb of Los Angeles, that he owned two expensive foreign cars and a 19-foot motorboat, that he had taken a trip to Thailand with his wife (Tr. 424-425), and that he had paid his attorney $8,000 to $10,000 in fees (Tr. 422-423).

Counsel subsequently moved for a mistrial on the ground that the question relating to the amount petitioner had spent in legal fees constituted misconduct on the prosecutor's part that prejudiced the defense (Tr. 436). The district court, in denying the motion, concluded that the evidence was relevant to petitioner's credibility and showed that petitioner's life style was inconsistent with his protestations of poverty on direct examination (Tr. 437-439). The court nonetheless instructed the jury that there was nothing unusual about the fees mentioned and that the jury should not be prejudiced against petitioner because of the fee paid to his lawyer (Tr. 480).[2]

ARGUMENT

1. Petitioner contends (Pet. 7-10) that the government's question about his attorneys' fees denied him the right to

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[2]The court instructed the jury as follows:

> I want you to seriously pay attention to this. There is nothing whatsoever wrong with having a lawyer come from California to defend this case. It is a perfectly natural thing under the circumstances for a person whose residence is in California to

the effective assistance of counsel. Viewed in context, however, the challenged question was proper cross-examination.

The question about attorneys' fees was part of the line of inquiry designed to show that petitioner enjoyed an expensive lifestyle and possessed substantial financial resources. On direct examination, petitioner had conveyed the impression that he lived very poorly during the period of the conspiracy, borrowing money from his father and living off his family and friends. He also suggested that his financial situation had not changed significantly between 1975 and the present (Tr. 345-412). Accordingly, proof that petitioner was living far above the means indicated by the sources of income to which he admitted was of substantial probative value in impeaching his credibility and suggesting an illicit source of substantial added income. See *United States* v. *Tramunti*, 513 F. 2d 1087 (C.A. 2), certiorari denied, 423 U.S. 823; *United States* v. *Falley*, 489 F. 2d 33 (C.A. 2). His attorneys' fees, like any other major expenditure, were a legitimate subject of inquiry on this score. The district court therefore acted well within its discretion in permitting the question about attorneys' fees.

Contrary to petitioner's contention, the inquiry into attorneys' fees did not constitute a penalty for the exercise of his Sixth Amendment rights. Unlike *United States ex*

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retain local attorneys to come here. This is a federal court. It is a national court. There is nothing wrong with having people investigate or in paying a fee.

A case like this requires a great deal of time, a lot happens outside the courtroom that you're not privy to, and there is nothing unusual about the fees mentioned.

I want to make it absolutely certain that there is no prejudice whatsoever against this defendant because of his attorney who strikes me as being very competent and highly ethical attorney, because he is a California attorney or because he is being paid a fee.

rel. Macon v. *Yeager*, 476 F. 2d 613 (C.A. 3), certiorari denied, 414 U.S. 855, the prosecutor's question did not invite the jury to conclude that petitioner was guilty because he had retained an attorney. The relevance of the question stemmed not from the fact that petitioner had retained counsel, but from the fact that he had been able to pay a substantial fee in spite of his claim on direct examination that he enjoyed only a modest income. Moreover, the trial court carefully instructed the jury that there was nothing wrong or unusual about the fee arrangement. The instruction cured any potential prejudice that may have stemmed from jury speculation about the nature of the fee arrangement.

2. Petitioner argues (Pet. 10-12) that certain comments made by the prosecutor during rebuttal were inflammatory and denied him a fair trial. The court of appeals sharply criticized the prosecutor's remarks, but it concluded that no reversible error was committed, in part because the remarks were provoked by defense counsel's summation. There is no reason for this court to review that determination.

In his summation, defense counsel suggested that the government had tried to "poison the water" against petitioner, had pressured witnesses to testify against petitioner, and had prepared scripts for its witnesses in an effort to secure a conviction (Tr. 483, 489, 491-493). In response, the prosecutor made the following comment (Tr. 513-514):

> Now, Mr. Osterhoudt also implied to you, and I emphasize the word implied, that Gerardi and Caruolo were put up to their testimony by the Government. This is the quote: "It is the truth, as defined by the prosecution." He used the word pressure. He used the word script. He implied we wrote out a script for Gerardi. He memorized it and got up on the stand. He didn't come right out and say

that the Government made them falsely implicate an innocent person. He probably didn't want to offend you because he knew you wouldn't fall for it because it is offensive. But he implied it.

I say that is ridiculous. I suggest again there is absolutely no basis in the record for it. And it should be rejected out of hand.

Don't you think there are enough guilty narcotics dealers in the United States that we don't have to drum up a case against an innocent person? Do you think our salaries depend on whether we convict George Burgio? Why should we do such a thing unless he was guilty?

THE COURT: No.

MR. OSTERHOUDT: That is improper.

THE COURT: Sustained.

You decide the case on the evidence. The Government is not on trial—

MR. APPLEBY: I suggest he put the Government on trial.

THE COURT: If he did I don't want you to make the argument in any event. Go to something else.

As the court of appeals recognized, the prosecutor's argument was improper. Nonetheless, in the context of defense counsel's attack on the integrity of the prosecution, and in light of the court's curative instruction and the strength of the evidence against petitioner, the comment did not deprive petitioner of a fair trial. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 240-242; *United States ex rel. Clark* v. *Fike*, 538 F. 2d 750

(C.A. 7), certiorari denied, 429 U.S. 1064; *United States* v. *Santana*, 485 F. 2d 365 (C.A. 2); *United States* v. *LaSorsa*, 480 F. 2d 522 (C.A. 2), certiorari denied, 414 U.S. 855.[3]

3. Finally, petitioner contends (Pet. 12-15) that the district court's standard instruction on the credibility of a defendant improperly rendered his testimony suspect. The district court gave the following instruction to the jury (Tr. 526):

> The defendant is competent as a witness. He voluntarily took the stand, although he didn't have to. His testimony should not be disbelieved merely because he is a defendant and you may, as in the case of an accomplice, or informer, rely on so much of it as you believe. In weighing his testimony, however, you may consider the fact that he has a vital interest in the outcome of the trial and you may consider his prior statements and explanations of them in assessing his credibility.

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[3]The cases on which petitioner relies as establishing a conflict among the circuits are distinguishable. In *McMillian* v. *United States*, 363 F. 2d 165, 169 (C.A. 5), and *Dunn* v. *United States*, 307 F. 2d 883 (C.A. 5), the court criticized the practice of suggesting that there was other evidence, not presented to the jury, that established the defendant's guilt. In *Hall* v. *United States*, 419 F. 2d 582 (C.A. 5), the court reversed the defendant's conviction on the basis of a whole range of improper comments during summation, for which there was neither provocation nor a curative instruction. And in *Greenberg* v. *United States*, 280 F. 2d 472 (C.A. 1), the United States Attorney similarly engaged in lengthy improper argument, without apparent provocation or correction by the court, and culminating in a long statement of his personal belief in the guilt of the defendant and his own expertise in judging such matters. In this case, by contrast, the statement, albeit improper, was brief; it was quickly corrected by the court; and it was directly responsive to a sharp attack by petitioner's counsel.

This instruction properly informed the jury that petitioner was a competent witness and should not be disbelieved merely because he was a defendant, as well as noting his special interest in the outcome of the trial. It was within the district court's discretion to call the attention of the jury to petitioner's "vital interest," since the fact that he was the defendant created an interest greater than that of any other witness and to that extent affected the question of credibility. This Court approved such an instruction in *Reagan* v. *United States*, 157 U.S. 301, 305-306, noting: "The fact that he is a defendant does not condemn him as unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent affects the question of credibility. It is, therefore, a matter properly to be suggested by the court to the jury." The majority of the courts that have recently addressed the issue have approved the use of the challenged instruction. See, *e.g.*, *United States* v. *Wiggins*, 566 F. 2d 944 (C.A. 5), certiorari denied, June 5, 1978, No. 77-6400; *United States* v. *Preciado-Gomez*, 529 F. 2d 935, 942 (C.A. 9), certiorari denied, 425 U.S. 953; *United States* v. *Martin*, 525 F. 2d 703, 706-707 (C.A. 2), certiorari denied, 423 U.S. 1035; *United States* v. *Hill*, 470 F. 2d 361, 363-365 (C.A. D.C.).

Contrary to petitioner's suggestion (Pet. 9), the Seventh Circuit has not held that the use of this instruction is error. See *United States* v. *Van Drunen*, 501 F. 2d 1393, 1395-1396 (C.A. 7), certiorari denied, 419 U.S. 1091; *United States* v. *Saletko*, 452 F. 2d 193, 197-198 (C.A. 7), certiorari denied, 405 U.S. 1040. While it has observed that including the defendant in the general instruction on witness credibility, rather than mentioning him separately,

is "a sounder procedure,"[4] the circuit has "continually upheld instructions on this subject," *United States* v. *Saletko, supra*, 452 F. 2d 197-198 and n. 4.

Only the Eighth Circuit has held that the instruction challenged here is error, and that circuit has declined to find the error prejudicial where "[t]he [defendant's] personal interest in the outcome of the trial proceedings was obvious to the jurors, the instruction was not inflammatory and it did not intimate * * * that the [defendant] was a perjurer." *United States* v. *Bear Killer*, 534 F. 2d 1253, 1260 (C.A. 8), certiorari denied, 429 U.S. 846.

Here the instruction simply pointed out the obvious fact that petitioner had a significant interest in the outcome of his trial, and it avoided doing so in an "inflammatory" manner or suggesting that petitioner had committed perjury. This charge was preceded by a caution that the jury should not discount petitioner's testimony just because he was the defendant, and by the instruction that the jury "rely on so much of it as you believe" (Tr. 526). In addition, the judge gave appropriate instructions concerning the presumption of innocence and the government's burden of proof (Tr. 519-520). The result of these instructions, taken as a whole, was that the jury was instructed to subject petitioner's testimony to "the same scrutiny as the testimony of other witnesses with a special interest." See *United States* v. *Hill, supra*, 470 F. 2d at 365. In the circumstances of this case, therefore, even the Eighth Circuit presumably would not have found reversible error, and the case therefore presents no conflict requiring this Court to reconsider its earlier approval of the challenged instruction in *Reagan* v. *United States, supra*.

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[4]The First Circuit in *Carrigan* v. *United States*, 405 F. 2d 1197, 1198, similarly encouraged trial courts to include the defendant in the general credibility instruction as to all witnesses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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